

JUL 15 2003

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

ASTOLFO COTA,

Plaintiff - Appellant,

v.

CYPRUS AMAX MINERALS
COMPANY, an Arizona corporation, et
al.,

Defendants - Appellees.

No. 02-16658

D.C. No. CV-00-00703-DCB

MEMORANDUM*

ASTOLFO COTA,

Plaintiff - Appellee,

v.

CYPRUS AMAX MINERALS
COMPANY, an Arizona corporation, et
al.,

Defendants - Appellants.

No. 02-16790

D.C. No. CV-00-00703-DCB

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the District of Arizona
David C. Bury, District Judge, Presiding

Submitted July 11, 2003**
Pasadena, California

Before: KOZINSKI, FERNANDEZ, and RYMER, Circuit Judges.

Astolfo Cota appeals summary judgment in favor of Cyprus Amax Minerals Company and Phelps Dodge Corporation (collectively, Phelps Dodge) on his claim under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (ADA). We affirm.

Even assuming that Cota has a disability or is perceived as having one, there is no triable issue that he can perform the essential functions of a Maintenance Technician V, with or without reasonable accommodation. 42 U.S.C. § 12111(8). While Cota disputes Phelps Dodge's description of the "essential functions" of the Tech V position, his argument rests entirely on the opinion of a vocational rehabilitation specialist whose testimony the district court properly excluded. *See Broussard v. Univ. of Cal., at Berkeley*, 192 F.3d 1252, 1258 (9th Cir. 1999). He suggests that he could be accommodated by coworkers' performing essential

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

functions that he cannot, but this is neither a *reasonable*, nor a required, accommodation. Accordingly, Cota failed to make out a prima facie case under the ADA.

In any event, Phelps Dodge offered him a reasonable accommodation. *See* 42 U.S.C. § 12112(b)(5)(A). That Cota declined this position does not change the fact that he was accommodated in accordance with the ADA.

AFFIRMED.